No. 238

In The

Supreme Court of the United States

October Term, 1960

H. A. Lott, Lee Blocker and Lorn D. Frazier,
Petitioners,

v.

The United States of America,
Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

John H. Crooker
Bank of the Southwest Bldg.
Houston 2, Texas

Denman Moody
Esperson Building
Houston 2, Texas

Joe S. Moss
W. V. Ballew, Jr.
C. W. Wellen
Walter E. Workman
William M. Ryan
Counsel for Petitioners

Of Counsel:

Baker, Botts, Andrews & Shepherd
Fulbright, Crooker, Freeman, Bates & Jaworski

A. BORG PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

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REPLY TO RESPONDENT'S ARGUMENT

The irreconcilable conflict upon which Petitioners rely as a basis for certiorari was not resolved by this Court in the Robinson case.

The Government's brief in opposition serves only to emphasize the compelling reasons why this petition for a writ of certiorari should be granted. Existence of the conflict is expressly conceded by the Government, Br. 7:

> "It is true that the Tenth Circuit's decisions in *Lujan v. United States*, 204 F. 2d 171, and *Smith v. United States*, 273 F. 2d 462, certiorari denied, June 27, 1960, cannot be reconciled with the decision below or with the decisions of the other courts of appeals . . ."

Furthermore, the Government concedes *sub silentio* that the conflict concerns an issue of extreme importance in the administration of the Federal Rules of Criminal Procedure.

As its sole ground for opposing certiorari, the Government points to this Court's decision in *United States* v. *Robinson*, 361 U. S. 220 (Jan. 11, 1960), arguing that "for all practical purposes" it has resolved the conflict (Br. 9). Its argument is manifestly untenable. The *Robinson* case presented an issue wholly different from the issue in this case. Under the facts in *Robinson*, by any construction, there was no doubt that the time for filing notice of appeal prescribed by Rule 37(a)(2)* had expired — the only question was whether the time could be extended *after* it had expired, by virtue of Rule 45(b). The decision turned on a construction of Rule 45(b), rather than of Rule 37(a)(2). The narrow scope of the *Robinson* decision was set out in the opinion, 361 U. S. at 222:

> "The *single question* presented is whether the filing of a notice of appeal in a criminal case *after* expiration of the time prescribed in Rule 37(a)(2) confers jurisdiction of the appeal upon the Court of Appeals if the District Court, proceeding under Rule 45(b), has found that the late filing of the notice of appeal was the result of excusable neglect."†

The Government also relied upon the *Robinson* case in support of its motion to dismiss the appeal in the Court of Appeals (R. 660). However, that case was neither mentioned nor cited in the majority opinion of the court below (Pt. 29-40; R. 696-709) — this further demonstrates that the *Robinson* case is not pertinent to the issue presented to

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* All references to Rules are to Federal Rules of Criminal Procedure.

† Indications of emphasis throughout this brief have been supplied.

this Court. The language of this Court in the *Robinson* opinion quoted by the Government, Br. 8, has no conceivable bearing on this case — even when taken out of context.

To the extent that the *Robinson* decision fairly *may* be said to be relevant to the present inquiry, it supports *Petitioners'* contention that the court below erred in dismissing the appeal. In *Robinson*, this Court held that Rule 45(b) should be construed in accordance with the "plain meaning" of its "plain words," 361 U.S. at 224, 229 — which is precisely the contention of Petitioners with respect to Rule 37(a)(2).

If any decision of this Court is decisive, it is not *Robinson*, but *Sullivan* v. *United States*, 348 U.S. 170 (1954), which was pointed out in our petition, p. 9, but is not even mentioned in the Government's brief. *Sullivan* presented jurisdictional facts which were identical to those present in this case, and this Court — as well as the Court of Appeals — exercised jurisdiction over the appeal.

The Government's argument, Br. 8, that "*Lujan* and *Smith* cannot be deemed to have continuing vitality and probably will be overruled by the Tenth Circuit if the issue should again arise," is preposterous. *Smith* was heard by all of the circuit judges of the Tenth Circuit (save senior judges) sitting *en banc*. These five judges *unanimously* held that the *Lujan* decision should be followed — not only on grounds of *stare decisis*, but because it was correct — stating, 273 F. 2d at 465:

> " . . . It appears to us that the provisions of Rule 37(a)(2) are clear and unambiguous and can be changed only by the rule-making authority . . . "

Is it not the height of wishful thinking to speculate that the Tenth Circuit would overrule two unanimous, thoroughly-considered, well-reasoned, clearly correct and fair de-

cisions — and reduce Rule 37(a)(2) to a virtual trap — without a square decision from this Court?

If speculation were in order, Petitioners would submit that the Government's real reason for opposing certiorari is a premonition that this Court will adopt the obvious and fair Rule 37(a)(2) construction of *Smith* and *Lujan*, — rather than the tortured interpretation of the court below — and will reverse these improper convictions.

CONCLUSION

For the reasons stated therein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN H. CROOKER
DENMAN MOODY
JOE S. MOSS
W. V. BALLEW, JR.
C. W. WELLEN
WALTER E. WORKMAN
WILLIAM M. RYAN
Counsel for Petitioners

Of Counsel:

BAKER, BOTTS, ANDREWS & SHEPHERD
FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI